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ENFORCEMENT OF CONTRACT BY THIRD PARTY.

In the case of the *Dunlop Tyre Co. v. Selfridge & Co.*,[1] Lord Haldane formulates in three fundamental principles what he considers to be the present English rule of contracts, as regards the rights of third parties. They are: I, That a stranger (i. e., one who is not a party) to the contract cannot enforce it; II, That a person, with whom a contract not under seal has been made, may not enforce it unless he has given consideration; III, That a principal not named in the contract may not sue upon it, unless (a), the promissee really contracted as his agent, and (b), the principal either personally or through the agent has given consideration. These principles have been negatively stated, inasmuch as it is with the position of the third party we are concerned. It is here sought to be shown that there is a vital distinction between principles I and II—which for brevity's sake

[1] (1915) A. C. 847.

will be designated by the Roman numerals—which has been very little recognized by either English or American courts; and that, furthermore, principle II is by no means so firmly embedded in English law as the statement by Lord Haldane would lead one to suppose.

The typical issue, in which one or both principles may be presented, is that in which enforcement is sought by a beneficiary, either donee or obligee. But this beneficiary may hold one of two positions. In I he may be a total stranger to the agreement, to whom neither promise is made, nor from whom consideration moves, or he may, under II, be a party to the extent that the promise is made directly to him, though consideration move from another. Pollock on Contracts, in the note on American law,[2] points out the above line of cleavage. "Promises for the benefit of a third party," he says, "must also be distinguished from promises to one who has not given consideration for the promise"; and in illustration, though not affirmation, of principle II, goes on to state that "there seems to be no good reason why A should not be able, for consideration received from B, to make an effective promise to C. Unquestionably he may in the form of a promissory note, and the same result is generally reached in this country in the case of an ordinary simple contract." Unfortunately, however, this eminent authority proceeds to cite several cases as being of this nature, among them the leading decision of *Lawrence v. Fox*.[3] This, it is submitted, is clearly incorrect, inasmuch as the promise was made in that instance, to the party who gave consideration, for the benefit of a third. Only two of the six judges were of the opinion that by any manner of means could the giver of consideration be construed to be an agent for the third party, in receiving the promise. Other cases cited as examples—but, once more, not in affirmance—of II are as clearly correct,[4] while an insurance case like that of the *Palmer Bank v. Ins. Co.*,[5] in which there was a promise to the insured to pay any subsequent mortgagee, is much nearer the border line, though probably within the limits of I.

Anson on Contracts[6] lays down that "it is now established that no stranger to the consideration can take advantage of the

[2] Pollock: Contracts (Ed. Williston), 241.

[3] *Lawrence v. Fox*, 20 N. Y. 268.

[4] *Rector v. Teed*, 120 N. Y. 583; *Van Eman v. Stanchfield*, 10 Minn. 255.

[5] *Palmer Bank v. Ins. Co.*, 166 Mass. 189.

[6] Anson: Contracts (Ed. Huffcut), 106.

contract, though made for his benefit," while the editor in a footnote on American law declares that "if the promise is made directly to the plaintiff, he may recover upon it, notwithstanding consideration moves from another." As a matter of fact, American courts, as we have seen, have allowed enforcement by the third party in both positions, thus denying the application of either principles I or II to the law of this country.[7] Massachusetts continues to be the most reluctant to go the length of granting relief to the entire stranger.[8]

It is now equally well recognized that, as regards the stranger, English courts are of the same opinion as Massachusetts. Since the case of *Tweddle v. Atkinson*,[9] principle I has, as the Lord Chancellor claims, become firmly established. There is much more doubt as regards II. The comparatively recent decisions of *McGruether v. Pitcher*[10] and *Taddy & Co. v. Sterious & Netten*[11] display a tendency to support it, but the respective conclusions are reached on the ground that conditions as regard minimum retail price cannot pass with the goods and be imposed upon subsequent purchasers, rather than upon the ground of non-enforceability of a contract, once made, by the plaintiff who have given no consideration. But in *Slater v. Jones* and *Capes v. Ball*[12] the defendant debtor was allowed to set up a composition agreement among his creditors, under the Bankruptcy Act of 1869, in bar of suit, although no consideration had moved from him. The later case of *West Yorkshire Darracq Co. v. Coleridge*[13] is decided independently of the Bankruptcy Act. This was an instance of an agreement with the plaintiff, by the plaintiff's directors, in return for consideration given by the directors to each other, not to sue for their respective fees. The plaintiff, in defending against a counterclaim by the defendant for his fee, was allowed to enforce the agreement. The opinion of Harridge, J., locating this case under II but specifically disavowing that principle by finding for the plaintiff, takes

[7] Also recent cases: *Uhrich v. Globe Surety Co. of Kan. City*, 166 S. W. (Mo. App.) 845; *Grimes v. Barndollar*, 148 Pac. (Colo.) 256; *Stanley v. Weston*, 92 Kan. 317; *Harbeck v. Harbeck*, 149 N. Y. Supp. 791; *Torp v. Jahn*, 177 Ill. App. 85.

[8] *Sampson Co. v. Commonwealth*, 202 Mass. 326.

[9] *Tweddle v. Atkinson*, 1 B. & S. 393.

[10] *McGruether v. Pitcher*, 91 L. T. 678.

[11] *Taddy & Co. v. Sterious & Netten*, 89 L. T. 628.

[12] L. R. 8 Ex. 186.

[13] *West Yorkshire Darracq Co. v. Coleridge*, 2 K. B. 326.

a radical step toward the American doctrine. He says, "It is contended for the defendant that though the agreement may be binding as between the defendant and his co-directors, the company are not thereby relieved from liability to pay the defendant his fees. In support of that contention the case of *Tweddle v. Atkinson* was cited, reliance being placed especially on the judgment of Wightman, J.; but it is clear that the plaintiff in that case was in no sense a party to the agreement, and the decision cannot, therefore, be regarded as governing the present case."

C. B.

PRICE RESTRICTIONS ON RESALE OF CHATTELS.

In a recent Federal case,[1] the court held that an agreement for price restriction in case of a patented article was binding upon the vendee. Stress was laid upon the fact that the object to which the agreement related was a patented article, thus raising an inquiry in the mind of the reader as to what result would follow if an ordinary chattel were involved.

That a general restraint on the alienation of chattels is void is a well-established common-law doctrine.[2] But this does not mean that all conditions on vendee's privilege of resale are invalid. For limited restrictions as an incident to the sale of chattels are permissible at common law.[3] The usual test of validity is that such restriction must not be wider than the protection of the parties thereto demands nor so wide as to affect the public injuriously—in other words, it must not be in unreasonable restraint of trade.[4] And so even in cases of ordinary chattels, the circumstances may be such as to make stipulations as to price of resale binding upon the vendee.[5]

According to the decision of the principal case, the patent has added to the power of its owner enabling him to exact an agreement from the vendee as to the price of resale even though the effect is to prevent competition and thus maintain prices. So that patented articles are exempted from the operation of the usual common law inhibition of restraint of trade or monopoly.

[1] *American Graphaphone Co. v. Boston Store of Chicago*, 225 Fed. 785.
[2] *Coke on Littleton*, Sect. 360.
[3] *Grogan v. Chaffee*, 156 Cal. 611; *Walsh v. Dwight*, 40 N. Y. A. D. 513; *Garst v. Harris*, 177 Mass. 72.
[4] *John D. Parks & Sons Co. v. Hartman*, 153 Fed. 24.
[5] See note 3, supra.